United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

ORIGINAL

No. 75-6007

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

P/S

UNITED STATES OF AMERICA,
Petitioner-Appellee,

v.

FIRST NATIONAL CITY BANK,
Respondent-Appellant,

CHEMICAL BANK NEW YORK TRUST CO.,
Respondent,

and

MILTON F. MEISSNER,
Proposed Intervenor-Appellant.

APPEAL FROM ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN CIVIL ACTION M 18 304

BRIEF FOR PROPOSED INTERVENOR-APPELLANT MILTON F. MEISSNER

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STATEMENT OF ISSUES

1. Whether the Court below should have required a plenary proceeding in which the taxpayer is made a party as a basis for determining whether the government should be

permitted to break into and search the taxpayer's safe deposit boxes and seize and obtain any property contained therein belonging to the taxpayer.

2. Whether the Court below erred in refusing to examine the legality of the jeopardy assessment asserted by the government as the basis for its suit and in not enjoining the jeopardy assessment for failure of the government to comply with the statutory requirements.

3. Whether the government should be required to prove contested facts alleged in its petition.

4. Whether the government's apparent objective to obtain evidence in connection with two ongoing grand jury investigations constitutes an invalid purpose for breaking into and searching a safe deposit box pursuant to a jeopardy assessment.

5. Whether a taxpayer's Fourth and Fifth Amendment privileges are a bar to the government's asserted claim of right to break into and search the taxpayer's safe deposit boxes following a jeopardy assessment.

STATEMENT OF CASE

By petitions filed on October 4, 1974 against the First National City Bank and the Chemical Bank New York Trust Company in the United States District Court for the Southern District of New York, the government sought a court order permitting it to break into and to search at the respective banks two safe deposit boxes--the sole lessee of which is Dr. Milton F. Meissner--and "to seize and obtain any property or rights to property belonging to the taxpayer, Milton F. Meissner, which may be contained in safe deposit box ... which is located at the respondent's offices ...."[1] Dr. Meissner was not named as a party or served with the petition.

The petitions were based upon a jeopardy assessment, made unilaterally by the Internal Revenue Service (IRS), now properly at issue before the Tax Court which has made no final determination.

Although the petitions request a court order permitting the seizure of the taxpayer's property in the boxes, allegedly for tax collection purposes, the government's real purpose in

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[1]Petition of the United States filed in this case by the government against the First National City Bank, p. 4, para. 2.

seeking to forcibly break into and search the two safe deposit boxes apparently relates to seeking evidence, and has been clearly stated:

> "At this juncture we seek no personal liability against the respondent, but only knowledge as to the contents of the safe deposit box[es]."[2]

> "On October 4, the Government filed duplicate petitions ... for the sole and limited purpose of learning about the contents of the safe deposit boxes."[3]

Dr. Meissner, through counsel, moved on October 15, 1974 to intervene in order to assert his constitutional rights, to require the government to prove the allegations in its petitions, and to challenge the procedural steps which served as the basis for the petitions. United States District Judge Lloyd MacMahon took the matter under advisement and by Opinion filed December 31, 1974 denied the Motion to Intervene. Dr. Meissner's Motion for Reargument, dated January 10, 1975, was granted on January 27, 1975, but the Court adhered to its original decision.

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[2]Government's Memorandum of Law, p. 7, in the District Court proceeding.

[3]Brief of the United States opposing Dr. Meissner's Motion for Stay Without Bond Pending Appeal, p. 2, filed in this case, No. 75-6007.

By separate orders filed January 27, 1975, Judge MacMahon granted the government the right to break into the safe deposit boxes at the two banks and to search and to seize "any property having any monetary value, not otherwise exempt by statute, which is contained in said safe deposit box[es]." Dr. Meissner was not permitted to regain possession of property having no monetary value at the safe deposit box leased by the First National City Bank; rather, the Court ordered that "the First National City Bank shall maintain possession of any items contained in said safe deposit box not removed by the Internal Revenue Service until further Order of this Court." With respect to property in the Chemical Bank safe deposit box not seized by the IRS, the Court ordered that this property be placed in a separate safe deposit box and that the bank deliver "the keys to the petitioner (government) who shall deliver the same to the attorney for the lessee when the petitioner has no further need for the keys."

The District Court granted the above orders despite the fact that respondent FNCB filed an answer to the government's petition, contesting by denial or lack of knowledge or information sufficient to form a belief, certain factual allegations in the petition, which the government was not required to prove.

On January 27, 1975 the District Court granted a stay pending appeal, but conditioned the stay upon the posting of a bond in the amount of $260,000 within forty-eight hours of the filing of a notice of appeal. Notice of appeal was timely filed on behalf of Dr. Meissner on March 26, 1975. FNCB also timely filed a notice of appeal. Subsequently, on April 15, 1975, this Court by Order of Kaufman, CJ and Timbers, J, denied the request of Dr. Meissner and of FNCB for a Stay Without Bond Pending Appeal. On April 17, 1975, Justice Marshall denied the applications for relief from bond filed on behalf of Dr. Meissner and FNCB.

On April 22, 1975 the government forcibly entered both safe deposit boxes. It seized the entire contents of the Chemical Bank box. An inventory of the contents of the FNCB box has been taken but to date no resolution has been made concerning the disposition of the 222 items in the box, which includes, among other things, personal papers of Dr. Meissner and property belonging to third parties. The government now seeks possession of all these items.

Set forth below are the details and background of the government's actions to levy upon and to seize contents of the safe deposit boxes.

In November, 1972, the government initiated a civil suit entitled SEC v. Vesco, et al., 72 Civ. 5001, S.D.N.Y., charging misappropriations of large amounts of stock and monies. Dr. Meissner was made a defendant in the civil suit. On February 22, 1973, Judge Stewart, in recognition of Dr. Meissner's constitutional rights, entered a protective order, directing that

> "[T]he discovery of Milton F. Meissner be had only if the Government grants him immunity pursuant to 18 U.S.C. §6002."[4]

On April 9, 1974, a copy of a notice of assessment (including civil fraud penalties) and demand for immediate payment was mailed from Washington, D. C. to Dr. Meissner and his wife, c/o his accountants, Main Lafrentz & Co., 280 Park Avenue, New York, New York. At that time--April 9, 1974--and since June of 1970 (over two years before his current problems with the government arose), Dr. Meissner has been a non-resident of the United States, a fact not contested by the IRS. In the early afternoon of the next day, April 10, 1974, the government sealed the safe deposit boxes at issue

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[4]The SEC sought a writ of mandamus to reverse Judge Stewart's order but the Second Circuit Court of Appeals denied the Government's petition on the ground that the order was not reviewable in mandamus which "is reserved for extraordinary situations." Securities and Exchange Comm'n. v. Stewart, 476 F.2d 755, 759 (2d Cir. 1973).

in this case pursuant to a Notice of Levy and Notice of Seizure, dated April 10, 1974. The Notice of Levy was said to be based upon an administrative determination of deficiency and liability for additional tax made by or on behalf of the Commissioner of Internal Revenue. The assessment of the deficiency was purportedly made under the provisions of the Internal Revenue Laws applicable to jeopardy assessments.

Almost six months later the government filed its petitions to break into and search the safe deposit boxes. The boxes remained under seal until April 22, 1975, as noted above, when they were forcibly entered pursuant to the orders of Judge MacMahon filed January 27, 1975. The instant appeal is taken from those two orders.

ARGUMENT

POINT I

THE SUMMARY PROCEEDING UTILIZED BY THE GOVERNMENT IS INVALID TO EFFECT A SEARCH AND SEIZURE OF PROPERTY, WHICH REQUIRES A PLENARY ACTION IN WHICH THE TAXPAYER IS MADE A PARTY.

The government should have proceeded below by plenary proceeding making Dr. Meissner a party defendant. It has erred by failing to comply with the requirements of Section 7403(b) of the Internal Revenue Code and resisting the adjudication of all matters involved in this action as required by Section 7403(c). Section 7403 provides, in part, as follows:

> "(a) Filing. In any case where there has been a refusal or neglect to pay any tax ... the Attorney General ... may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States ... or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.
>
> (b) Persons. All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.
>
> (c) Adjudication and Decree. The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property...."

Under the doctrine set forth in Shields v. Barrow, 58 U.S. 136, 139, (1854), Dr. Meissner is clearly an indispensable

party with respect to his rights as lessee of the safe deposit box and his rights in property contained in the safe deposit box because the relief sought by the government cannot be made without affecting that interest. Indeed, the banks who are nominal respondents, have no such interest in the property. Furthermore, Section 7403(b) specifically requires that all persons claiming any interest in the property involved in such action shall be made parties thereto, and Section 7403(c) requires that the court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims and liens upon the property.

Section 7402 of the Internal Revenue Code relied upon by the government is simply a grant of jurisdiction to the district court of the United States to make and issue writs, orders, judgments and decrees necessary or appropriate for the enforcement of the internal revenue laws in civil actions. All of the provisions and requirements of the Federal Rules of Civil Procedure, including discovery, are applicable in civil actions. The Supreme Court in New Hampshire Fire Insurance Co. v. Scanlon, 362 U.S. 404 (1960), pointed out that summary

proceedings were practically unknown to the English common law and that in the absence of express statutory authorization, courts have been extremely reluctant to allow proceedings more summary than the full proceedings envisioned by the Federal Rules of Civil Procedure which includes a procedure for summary judgment in an ordinary plenary civil action.

The taxpayer's right to protect his property interests in items sought by the government in jeopardy assessment cases was recognized by the Supreme Court in a case involving an IRS summons, Reisman v. Caplin, 375 U.S. 440, 449 (1964), where the court stated:

> "In addition, third parties might intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, may intervene."

For this reason reversal is required.

ARGUMENT

POINT II

THE JEOPARDY ASSESSMENT SHOULD BE ENJOINED FOR FAILURE BY THE GOVERNMENT TO COMPLY WITH THE STATUTORY REQUIREMENTS.

In its petitions the government asserts that the jeopardy assessment was validly made. If not validly made, the assessment should be enjoined and the petitions should be dismissed.

Under appropriate circumstances jeopardy assessments may be enjoined and this Honorable Court has so held. Pizzarello v. United States, 408 F.2d 579 (2d Cir. 1969), cert. denied, 396 U.S. 986 (1970). Accord, Lucia v. United States, 474 F.2d 565, 573 (5th Cir. 1973); see also, Sherman v. Nash, 488 F.2d 1081, 1084 (3d Cir. 1973).[5]

In the case at bar the government, which is the moving party, must show that the requirements under 26 U.S.C. 6331(a) have been met, including the requirement that the taxpayer must "fail or refuse" to pay the assessment. On April 9, 1974

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[5]The Third Circuit concisely stated its injunctive authority as follows: "Thus, pending a Tax Court decision which has become final, section 6213 clearly grants the district court jurisdiction to enjoin the assessments and levies imposed by the District Director on the Shermans and their property, unless such assessment was imposed in accordance with the authority granted in the jeopardy assessment provisions of section 6861." Sherman v. Nash, supra, at 1084 (footnote omitted).

the IRS , which knew that Dr. Meissner was a non-resident, mailed the assessment notice demanding immediate payment from Washington, D. C. to Dr. Meissner in care of his accountant in New York City. Starting the next morning--possibly even before the accountant received the letter--the IRS imposed the levy and lien on Dr. Meissner's property in the United States. Both safe deposit boxes were sealed by 2:02 p.m. Prior to notice the taxpayer cannot be said to have "failed or refused" to pay the assessment; thus, the requirements of the statute have not been met, and the seizure of the two safe deposit boxes is invalid.

The government has not proved that it acted in accordance with other aspects of the law as alleged in its petition, and accordingly, should be required to meet its burden of proof, particularly since the government alone has many of the facts necessary to show the validity of its action. See Point III, infra. Failure to satisfy the statutory requirements is fatal to the petitions:

> "The critical defect in the Government's position in the instant case is that it has failed to show that it took the formal steps under the statute at all ...." United States v. Bonaguro, 294 F. Supp. 750, 753 (E.D.N.Y. 1968)[6]

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[6]This opinion was quoted with approval by the Third Circuit in Sherman v. Nash, supra, 488 F.2d at 1084; see also, Rinieri v. Scanlon, 254 F. Supp. 469 (S.D.N.Y. 1966).

Dr. Meissner should be permitted through discovery procedures to explore other possible infirmities in the procedures utilized by the government relating to the jeopardy assessment. The available facts establish that the government has failed to satisfy the applicable statute, thus the case should be reversed and remanded to the District Court requiring that this case be reversed and remanded to enjoin the assessment and levy or, at the very least, to permit discovery to be pursued and evidence to be taken.[7]

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[7]The government may argue, as it did in its opposition to Dr. Meissner's Motion for Stay Without Bond Pending Appeal, that Dr. Meissner is a "fugitive from justice" (Brief of the United States, pp. 6,8). This assertion is irrelevant, inaccurate and without merit. It is irrelevant because by being out of the country Dr. Meissner does not forfeit his right to assert constitutional or other defenses, particularly in a civil suit initiated by the government. See United States v. Weinstein, No. 74-2595, p. 15 (2d Cir. January 20, 1975). It is inaccurate because Dr. Meissner has been a non-resident of the United States since June, 1970, long before the jeopardy assessment of April, 1974. At no time can he be said to have fled. While Dr. Meissner failed to respond to a grand jury subpoena served extraterritorially, there are serious constitutional questions involving the procedures utilized. Although the statute under which he was served provides only for civil penalties, a bench warrant was issued for Dr. Meissner. However, he has not been charged with a crime. Contrary to the statement made by the government in its brief on page 8, he has not been held in contempt.

ARGUMENT

POINT III

THE GOVERNMENT SHOULD BE REQUIRED TO PROVE THE FACTS ASSERTED AS THE BASIS FOR ITS PETITION BEFORE OBTAINING RELIEF

The government has encroached upon the private rights of Dr. Meissner both by searching his property (the leased safe deposit boxes) and by seizing his property (the contents of the Chemical box). The government should be required to show that it has faithfully observed the safeguards which have been established to ensure that an individual's rights are protected.

An individual's rights are to be particularly guarded where, as here, the basis for the petitions is an assessment determination made unilaterally by the IRS. The amount of the assessment is at issue before the Tax Court which has made no final determination.

To sustain its petitions, the government made a number of allegations. Some of these allegations were contested by the answer of FNCB, but most were subject to proof requirements because of the FNCB answer of "no knowledge or information

sufficient to form a belief as to the truth ... of the allegations ...." In the district court proceeding, the government did not prove allegations contained in its petitions, nor was it required to do so. It is respectfully submitted that this was reversible error.

Of greatest significance, however, is the unfairness of utilizing a proceeding which does not include the participation of Dr. Meissner who is the real party in interest and the unfairness of not permitting him to put the government to its burden of proof, a burden the government may well not be able to sustain in this case. For example, the taxpayer should be permitted to explore vigorously such issues as whether appellee complied with the requirements of the Internal Revenue Code and the regulations thereunder,[8] whether jurisdiction was properly invoked,[9] whether notice and demand were duly

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[8]Cf., United States v. Bonaguro, supra; for example, because of the requirement that the jeopardy assessment be made by a District Director, jeopardy assessments have been enjoined where made by a lesser official. See, 8 CCH Standard Fed. Tax Rept. ¶5620.05; see also, United States v. Giordano, 416 U.S. 505 (1974).

[9]For example, see Point I, supra.

made[10] and whether, as each petition alleges, "no assets sufficient to satisfy the outstanding tax liability of the taxpayer have been found in this or any other jurisdiction by the petitioner or its agents, other than such property as may be contained in the aforementioned safe deposit box" (emphasis added).[11]

The District Court failed to resolve the contest of facts raised by the answer of FNCB and foreclosed other potential challenges to the government's factual allegations by excluding Dr. Meissner, the only real party in interest, from the case. To say that the government's allegations need not be proved in accordance with the applicable standards of proof is to say that the action of the District Court in granting the petitions is a mere formality.

Hence a reversal is requested in order to permit inquiry into the factual basis for the allegations.

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[10] See Point II, supra.

[11] This must be false because the government made the exact same allegation in each petition. In addition, it made the same allegation in a similar petition to break into and search Dr. Meissner's safe deposit box in the Mellon Bank in Pittsburgh. See United States v. Mellon Bank, N.A., Civil Action No. 74-717 (D.C. W.D. Pa.).

ARGUMENT

POINT IV

THE GOVERNMENT'S APPARENT OBJECTIVE IN ENTERING AND SEARCHING THE SAFE DEPOSIT BOXES IS TO OBTAIN EVIDENCE, CONSTITUTING AN INVALID PURPOSE REQUIRING DENIAL OF THE PETITIONS.

As noted by the Supreme Court in Reisman v. Caplin, 375 U.S. 440, 449 (1964), an IRS summons may be challenged by the taxpayer on any appropriate grounds, including:

> "[T]he defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution ...." (Citation omitted).

The taxpayer in this case seeks to challenge the petitions on these grounds.

The safe deposit boxes were sealed on April 10, 1974 so that no one could get in and nothing could get out. The government then waited almost six months before filing its actions to search the safe deposit boxes. Failure of the government to follow up on its levy of April 10 to get into the safe deposit boxes under the jeopardy assessment has lent emphasis to its admissions concerning the purpose of the petitions:

> "On October 4, the Government filed duplicate petitions ... for the sole and limited purpose of learning about the contents of the safe deposit boxes." Brief of the United States in opposition to Dr. Meissner's Motion for Stay Without Bond Pending Appeal, p. 2.

Until final resolution of Dr. Meissner's Tax Court petition, the government is precluded by statute[12] from selling any property seized pursuant to a Notice of Levy except for "perishables" which are not at issue here.[13]

By entering the safe deposit boxes in this case the government is apparently acting contrary to its own rules:

> "However, before property is seized, a determination should be made as to whether the mere filing of a notice of lien would be adequate protection during the suspended period."
> Internal Revenue Manual §5352.

It is submitted that the government's motive is not the collection of revenue, which is the only valid purpose for entering the boxes, but rather the search for evidence. A grand jury investigation in the Southern District of New York into the matters arising out of SEC v. Vesco, et al., supra, in which Dr. Meissner is a defendant has been ongoing since at least 1973. The United States Attorneys office has advised that Dr. Meissner is a target of this grand jury investigation. In addition, the IRS has had an open criminal

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[12] 26 U.S.C. §6863(b)(3).

[13] The government urges that such items as stock warrants are perishables within the meaning of the statute. Even if this interpretation is correct, which is highly questionable, the taxpayer could always arrange with the IRS to effect a sale of such items, with an IRS lien attaching to the proceeds.

investigation since at least the beginning of 1974 but no decision on prosecution has been made at the investigative level. Nevertheless, the same government prosecutor who is handling the SEC grand jury investigation, recently initiated a simultaneous gra.d jury investigation concerning Dr. Meissner's income taxes even though the IRS investigation is still open.

It is clear that the government may very well be seeking to enter the boxes for an improper purpose--to search for evidence and to use such evidence as it may obtain to further its criminal investigations against Dr. Meissner. Thus, the petitions should have been denied.[14]

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[14]The Fifth Circuit recently observed in a jeopardy assessment case that Congress did not intend "that by merely following the formal procedures of section 6861, the IRS should have thereby complete license to act arbitrarily and in bad faith and for other than the purpose of preserving revenue." Sherman v. Nash, supra, at 1084 (3d Cir. 1973) (emphasis added).

ARGUMENT

POINT V

DR. MEISSNER'S FOURTH AND FIFTH AMENDMENT RIGHTS HAVE BEEN VIOLATED BY THE ILLEGAL SEARCH AND SEIZURE.

The facts in this case compel the conclusion that the government's search of the two safe deposit boxes, the seizure of the items in the Chemical box and the taking of an inventory of the items in the FNCB box violate Dr. Meissner's Fourth and Fifth Amendment rights.[15]

The government should not be permitted to circumvent Dr. Meissner's constitutional rights by use of the petitions. Dr. Meissner has property rights in the box space, and he has property rights in all the personal property he owns that the boxes contained. He continues to have rights in personal property seized by the government. See, e.g., 26 U.S.C. 6335(b) which provides that "the Secretary or his delegate shall as soon as practicable after the seizure of the property give notice to the owner ...." (emphasis added). See also, 26 U.S.C. 6336 and 6337.

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[15]The circumstances under which Dr. Meissner seeks to assert his constitutional rights show a very real threat of criminal prosecution in light of the ongoing grand jury investigation arising out of the circumstances involved in the SEC civil case and in light of the simultaneous IRS criminal and grand jury investigations of Dr. Meissner's tax affairs. See Point IV, supra.

In a case closely parallel to the instant one, this Court upheld a taxpayer's assertion of his Fourth and Fifth Amendment rights. United States v. Guterma, 272 F.2d 344 (2d Cir. 1959). In Guterma the government sought books, records and documents of the taxpayer from a safe located on the premises of a third party corporation. Only the taxpayer, and not the third party safeholder, had the ability (the combination) to open the safe. As in the case at bar, the government would have had to search the safe to determine what items, if any, belonged to the taxpayer. This Court refused the government entry into the box. The Guterma case was recently discussed favorably by the Supreme Court in Couch v. United States, 409 U.S. 322, 333, n.16 (1973).[16]

If the government wants to search the box for the purpose of making additional assessments, the petitions before this Court are not a valid means of doing so; if it wishes to obtain evidence for a criminal prosecution, these petitions are not the proper method.

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[16] In Reisman v. Caplin, supra, at 449, the Supreme Court affirmed the right of an intervenor to assert constitutional defenses in a suit by the taxpayer's attorney's for injunctive relief against the IRS to prevent the taxpayer's accountants from being compelled to surrender the taxpayer's audit reports and papers pursuant to an IRS summons. The High Court held that "the witness may challenge the summons on any appropriate ground," and went on to note that "in the event the taxpayer is not a party ... he, too, may intervene."

The Court below had jurisdiction to deny the petitions based on either or both of the constitutional arguments. Dr. Meissner should have been permitted to make these arguments.[17] As the Supreme Court noted in United States v. Powell, 379 U.S. 48, 58 (1964), a case involving Fourth and Fifth Amendment privileges in a challenge to an IRS summons:

> "It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." (footnote omitted).

For these reasons a reversal is requested.

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[17]The Supreme Court has recently held that a person may not be compelled to produce incriminating material in a civil case because his Fifth Amendment rights would not be adequately protected in a subsequent criminal proceeding. Maness v. Meyers, 43 U.S.L.W. 4143, 4147 (Jan. 15, 1975).

CONCLUSION

For the reasons set forth above, it is respectfully requested that the judgment of the District Court should be reversed, the petitions dismissed and all property seized from the two safe deposit boxes returned.

Respectfully submitted,

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JUNE 5, 1975

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached brief has been mailed, first class, postage prepaid to the Honorable Paul J. Curran, United States Attorney, U. S. Courthouse, Foley Square, New York, New York 10007, Attention: William R. Bronner; Matthew C. Gruskin, Esq., Shearman & Sterling, 53 Wall Street, New York, New York 10005; and to William A. Smith, Jr., Esq., John B. Wynne, 20 Pine Street, New York, New York 10005 this 6th day of June, 1975.

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